IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

JULE M. SUGARMAN, Administrator of the New York City Human Resources Administration and HARRY I. BRONSTEIN, City Director of Personnel and Chairman of the New York City Civil Service Commission,

Appellants,

against

PATRICK MC. L. DOUGALL, ESPERANZA JORGE, TERESA VARGAS, and SYLVIA CASTRO, individually and on behalf of all others similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

JURISDICTIONAL STATEMENT OF THE STATE OF NEW YORK

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellants
80 Centre Street
New York, New York 10013

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

JOEL LEWITTES
JUDITH A. GORDON
Assistant Attorneys General
of Counsel

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JURISDICTIONAL STATEMENT OF THE STATE OF NEW YORK

The State of New York appeals from an order of the United States District Court for the Southern District of New York (statutory three-judge court), entered on December 23, 1971, declaring New York Civil Service Law §53 unconstitutional under the Equal Protection Clause of the Fourteenth Amendment on the ground that the statute prevents aliens from competing for positions in the career civil service on same terms as citizens and under the Supremacy Clause, Article VI, Clause 2, on the ground that the statute conflicts with a comprehensive plan for the

regulation of immigration and naturalization enacted by Congress. The three-judge district court enjoined the enforcement of § 53 but stayed its order pending appeal to this Court.

Opinions Below

The opinion and order of the single district judge (unreported), dated May 24, 1971, convening a three-judge court is reproduced herein as Appendix "A". The opinion of the three-judge district court (unreported), dated November 9, 1971, is reproduced herein as Appendix "B". The order of the three-judge district court, dated December 23, 1971, is reproduced herein as Appendix "C". There are no separate findings of fact and conclusions of law.

Jurisdiction

The jurisdiction of this Court to review the instant case is conferred by 28 U.S.C. § 1253.

The order of the three-judge district court was filed on December 23, 1971. The State of New York filed a Notice of Appeal on January 19, 1972 in the United States District Court for the Southern District of New York. The Notice of Appeal is reproduced herein as Appendix "D".

Jurisdiction of the district court was conferred by 42 U.S.C. §§ 1981, 1983 and 28 U.S.C. §§ 1343(3)(4), 2201, 2281, 2284.

Statute Involved

New York Civil Service Law § 53 states:

"*Citizenship Requirements*

1. Except as herein otherwise provided, no person shall be eligible for appointment for any position in

the competitive class unless he is a citizen of the United States.

2. Notwithstanding any of the provisions of this chapter or of any other law, whenever a department head or appointing authority deems that an acute shortage of employees exists in any particular class or classes of positions by reason of a lack of a sufficient number of qualified personnel available for recruitment, he may present evidence thereof to the state or municipal civil service commission having jurisdiction which, after due inquiry, may determine the existence of such shortage and waive the citizenship requirement for appointment to such class or classes of positions. The state commission or such municipal commission, as the case may be, shall annually review each such waiver of the citizenship requirement, and shall revoke any such waiver whenever it finds that a shortage no longer exists. A noncitizen appointed pursuant to the provisions of this section shall not be eligible for continued employment unless he diligently prosecutes the procedures for citizenship.

Questions Presented

1. Whether N.Y. Civil Service Law § 53 bears an appropriate relationship to the state interests involved in the employment of career civil service personnel?

2. Whether the district court applied the correct standard under the Equal Protection Clause in requiring that § 53 be supported by a compelling state interest?

3. Whether § 53 conflicts with a comprehensive federal plan for the regulation of immigration and naturalization of aliens?

4. Whether § 53 erects an obstacle to aliens' entering and abiding within the State of New York inconsistent with federal policy?

Statement of the Case

Claiming violation of their Fourteenth Amendment rights, their right to interstate travel and contravention of the federal power to regulate aliens, appellees brought this action for declaratory and injunctive relief and damages. An order determining that the action could be maintained as a class action under Rule 23 of the Federal Rules of Civil Procedure was sought. Jurisdiction of the district court was alleged under 42 U.S.C. §§ 1981, 1983 and 28 U.S.C. § 1331, 1343(3)(4), 2201, 2202.

The action was commenced by service of summons and complaint upon the Municipal Appellants on March 5, 1971. An amended complaint was served on the Municipal Appellants on March 16, 1971.

The gravamen of the amended complaint was that the State of New York could not, consistently with Fourteenth Amendment standards, distinguish among applicants for career civil service positions on the basis of United States citizenship and that in doing so, the State had infringed the alien appellees' right to travel and to enter and abide within New York State. The amended complaint further alleged that the power to regulate the activities of aliens was vested exclusively in the United States Congress, and, alternatively, that the Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 *et seq.*, had pre-empted state regulation in this field.

When the action was commenced, the named Appellees had been employed in the New York City Civil Service for approximately three months and had been advised by the local appointing authority (the N.Y.C. Human Resources Administration) that their employment was terminated

subject to retention on payroll until accrued leave balances had been paid.

The action terminating the named Appellees was taken pursuant to N.Y. Civil Service Law § 53, subd. 1.* The named Appellees, with sixteen other aliens who were similarly terminated, entered the City Civil Service in December 28, 1971 when two privately sponsored job training programs in which they were employed were merged with a similar city program. The city program was administered by the N.Y.C. Human Resources Administration, and the group of twenty were appointed provisionally† to competitive class civil service titles utilized by that Administration. N.Y. Civil Service Law § 44. Their duties ranged from administering the program (Appellee Dougall) to semi-professional counselling (Appellee Castro) to clerical (Appellees Jorge and Vargas).

Shortly after their civil service employment commenced, a routine personnel investigation disclosed the alien status of the named Appellees and the sixteen others similarly employed. Their provisional appointments were then revoked and their services terminated.

By Order to Show Cause, signed March 5, 1971 and returnable March 9, 1971, the named Appellees moved for a temporary restraining order under 28 U.S.C. § 2284(3), the convening of a three-judge district court under 28 U.S.C. §§ 2291, 2284 and for an order determining that the

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*An exception is noted with respect to Appellee Castro: She was terminated for the additional reason that she lacked sufficient experience to qualify for the civil service position she held.

†N.Y. Civil Service Law § 65, subd. 1, authorizes interim, or provisional, appointments to the competitive class when appropriate eligible lists are not available to fill vacancies. No competitive examination is required. Provisional employees are subject to dismissal at the will of the appointing authority. *Matter of Koso* v. *Green*, 260 N.Y. 491 (1933); *Matter of Rohl* v. *Jeacock*, 259 App. Div. 208 (Fourth Dept. 1940), aff'd 284 N.Y. 660 (1940); *Matter of Poss* v. *Kern*, 263 App. Div. 320 (First Dept. 1942).

action could proceed as a class action under Rule 23 of the Federal Rules of Civil Procedure.

The Municipal Appellants opposed the motion on the grounds that no irreparable injury had been shown, that no substantial federal question was presented and that the class action issue should be referred to the three-judge court in the event one was convened and, alternatively, that Appellees' allegations with respect to the class did not meet the requirements of F.R.C.P. Rule 23. By Notice of Motion, dated April 5, 1971, the Municipal Appellants moved to dismiss the action under F.R.C.P. Rule 12(b)(1) on the ground that the court lacked jurisdiction over the subject matter.

Both motions were submitted to the Hon. Charles H. Tenney on May 4, 1971. In his opinion dated May 24, 1971, the single district judge held that subject matter jurisdiction was conferred by 28 U.S.C. 1343(3). Relying principally on *Purdy & Fitzpatrick Co.*, 79 Cal. Rptr. 77, 456 P. 2d 645 (1969), wherein the California Supreme Court declared a state statute prohibiting the employment by contractors of aliens on public work projects unconstitutional, the single judge held further that substantial federal questions involving the Equal Protection Clause and the Congressional scheme for immigration and naturalization were presented requiring a three-judge court. The single judge did not issue a temporary restraining order and did not rule on the class action aspects of the motion.

The three-judge court designated by order of the Chief Judge of the United States Court of Appeals for the Second Circuit consisted of Circuit Judge J. Edward Lumbard and District Judge Edward C. McLean and Judge Tenney. On June 7, 1971, pursuant to 28 U.S.C. §§ 2281, 2284, the State of New York was advised that the action challenging the constitutionality of § 53 was pending before the three-judge court. The Attorney General of the State of New York thereupon appeared in opposition to the con-

tentions of the Appellees. The case was heard on July 13, 1971.

On November 9, 1971, the three-judge district court rendered its opinion declaring N.Y. Civil Service Law § 53 unconstitutional and granting Appellees preliminary and permanent injunctive relief.* Circuit Judge Lumbard rendered an additional, concurring opinion.

The three-judge court opinion follows from the initial premise that the "rationale and holding" of *Graham* v. *Richardson*, 403 U.S. 365 (1971), "control the outcome" of Appellees' challenge to § 53.

The court first considered the classification between citizens and aliens embodied in § 53 under the Equal Protection Clause. Citing *Graham* v. *Richardson, supra* at 372, for the principle that classifications based on alienage are "subject to close judicial scrutiny", the court held that § 53 could not be sustained under the Equal Protection Clause unless it was supported by a compelling state interest. Applying this standard, the court examined two state interests: whether (1) the government is entitled to conduct its affairs through the agency of persons with undivided allegiance; and whether (2) the distinction between citizens and aliens for career civil service positions is properly related to efficient and stable government administration.

The court treated the first interest as requiring a showing that aliens are security risks and found that Appellants failed to sustain this burden. In an apparent effort to turn this alleged failure of proof into a point of law, in

* The court also granted Appellees' motion for an order determining that the action could be maintained as a class action. The court held that "the class shall consist of all permanent resident aliens residing in New York State who, but for the enforcement of Section 53, would otherwise be eligible to compete for employment in the competitive class of Civil Service." Footnote 4.

footnote 6 to the opinion, the court refers to the availability of other classes of public employment to aliens (e.g. N.Y. Civil Service Law §§ 41, 42) and the waiver provisions of subdivision 2 of § 53 stating: "Defendants would be on particularly shaky ground if they were to argue that aliens are ineligible for employment in [the competitive class of the civil service] because they are security risks." The court then concluded that the state's interest in employing persons of undivided allegiance in the career service was merely a restatement of the "special public interest doctrine" rejected by this Court in *Takahashi* v. *Fish & Game Commission*, 334 U.S. 410 (1948) and *Graham* v. *Richardson, supra.* In those cases, the interests advanced by the states were limited to the preservation of state resources for the benefit of citizens in preference to aliens.

The court also treated the second interest in economic terms. Characterizing the Appellants' argument as limited to the state's fiscal interest in hiring and training new employees to replace departing aliens, the court noted that there was no offer of proof on the question of whether an alien was more likely to depart the United States or the state than was a citizen to depart the state. Nonetheless, the court proceeded to compare the risk to the career service from the permanent resident alien who has resided in the state "for a number of years" and "whose family resides here" (although no proof was offered by Appellees on the latter point) with that of the recent citizen resident and finds that the citizen resident is not a better risk.* The court then assumes the comparison in Appellants' favor but still finds that the requirements of the Equal Protection Clause are not met presumably relying on its view that *Graham* v. *Richardson, supra,* mandates the application of the compelling state interest test.

* The court does not limit its holding on § 53 to the constitutionality of the statute as applied to permanent resident aliens. Rather, the statute is declared unconstitutional on its face and its enforcement is enjoined without exception.

Turning to consideration of the paramount federal power over the regulation of aliens, the court held that § 53 conflicted with the Supremacy Clause of the Constitution. In support of its position, the court cites the "comprehensive plan for the regulation of immigration and naturalization" enacted by Congress (presumably referring to the Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 *et seq.* and 42 U.S.C. § 1981*) and the federal policy forbidding a state to deny entrance and abode to aliens lawfully admitted to the United States. *Truax* v. *Raich,* 239 U.S. 33, 42 (1915). Without further discussion of how § 53 conflicts with the alleged comprehensive federal plan and what actual impact, if any, § 53 has on an alien's entry and abode in the State of New York†, the court simply assumes the facts necessary to support its conclusions:

> "Since the federal government has pre-empted the field in the case of denying aliens welfare assistance, it has done so in the instant one. Any alien who would be discouraged from residing in a state because it either denied or conditioned on long term residency his right to welfare assistance would likewise be discouraged from residing in New York because of Sec-

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*42 U.S.C. § 1981 does not prevent a state from enacting laws applicable exclusively to alien residents. *Takahashi* v. *Fish & Game Commission, supra* at 420.

†At footnote 8 of its opinion, the court cites *Sailer* v. *Leger,* the companion case to *Graham* v. *Richardson,* for the proposition that "very little actual impact" is necessary before a state statute contravenes the exclusive federal power to admit and exclude aliens. The court fails to take note of the stipulation in the *Sailer* record which states: "'[T]he denial of general assistance to aliens otherwise eligible for such assistance causes undue hardship to them depriving them of the means to secure the necessities of life, including food, clothing and shelter' and that 'the citizenship bar to the receipt of General Assistance in Pennsylvania discourages continued residence in Pennsylvania of indigent resident aliens and causes such needy persons to remove to other States which will meet their needs.'" *Graham* v. *Richardson, supra* at 370.

tion 53. Such an alien could logically conclude that his best or possibly his only opportunity for equal opportunity employment would be with the governments of the City and State, and to him Section 53 would constitute a serious obstacle to either his entrance and/or abode in New York. In fact, Section 53 could be viewed as reflective of a more pervasive state policy to discriminate against aliens and hence to have established additional artificial barriers to the entrance and abode of aliens."

In his concurring opinion, Judge Lumbard described the area to which the court's opinion did not extend as "those positions where citizenship bears some rational relationship to the special demands of the particular position." He continued: "There are some positions in the civil service, as in elective office, where broad policy decisions are made as a matter of course, and in such positions the state and city, and their citizens, may properly require the officeholder to be a United States citizen."

Assuming that Judge Lumbard was not concerned with aliens who were security risks, his opinion is difficult to reconcile with that of the court. First, he appears to accept the traditional reasonable relation standard as applicable to classifications based on alienage. Second, if the interest of the state in limiting competitive class employment to citizens is merely an economic one, as the court holds, it is difficult to see how that interest is justified by enlarging the employee's scope of responsibility.*

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* Although the court characterizes the positions in public employment available to aliens (e.g. N.Y. Civil Service Law §§ 41, 42) as "more responsible" than competitive class positions at footnote 6 of its opinion, there is no evidence in the record to support this proposition. In fact, the competitive class includes highly responsible positions such as attorneys. Conversely, the exempt (§ 41) and non-competitive (§ 42) classes include positions with minimal responsibility. For example, a clerical assistant may be assigned to exempt class and a dishwasher, to the non-competitive class.

Argument

This case touches the core of government—the identity of the rulers of the people. *Graham* v. *Richardson*, 403 U.S. 365 (1971), was concerned with securing the necessities of life for the alien poor and the state interest in limiting welfare expenditures by excluding aliens. Relying on an overly broad interpretation of *Graham* and considering that the state interest in § 53 was solely an economic one, the district court has erroneously required that aliens be treated identically with citizens in career civil service employment. The opinion of the district court, if upheld, mandates states and localities to turn over a share of their governments to aliens. The serious implications of this course of action must be considered and the misconception of the district court as to the all-embracing effect of *Graham* v. *Richardson* recognized and corrected.

1. N. Y. Civil Service Law § 53 bears an appropriate relationship to the state interests involved in the employment of career civil service personnel. To execute the policies of the executive branch, state and local governments cannot be required to employ persons who are presumed by law to have an allegiance to a foreign government. Nor can state and local governments be required to employ persons who cannot be relied upon to remain for the career service period.

The exclusion of aliens from public employment is practically universal.* Roth *The Minimum Standard of International Law Applied to Aliens* 151-152 (1949); (hereinafter "Roth"); United Nations Department of Economic and Social Affairs, Public Administration Branch, *Handbook of Civil Service Laws and Practices*

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* It appears that every civilized country except Ethiopia excludes aliens from civil service employment. *Jalil* v. *Hampton*, —— F.2d —— (D. C. Cir. March 8, 1972), slip op. at p. 11, n. 3.

(1966). Indeed, the practice of the federal government is substantially identical with that of New York State under § 53.* The federal legislation and regulations were recently sustained in in *Mow Sun Wong* v. *Hampton,* (N.D. Calif., No. C-70 2730RFP Aug. 30, 1971 appeal pending C.A. 9, No. 70-2730). See also *Jalil* v. *Hampton, supra.*

The exclusion of aliens from public service is based on two accepted principles completely unrelated to fiscal matters: the government is entitled to conduct its affairs through the agency of persons with undivided allegiance, *People* v. *Crane,* 214 N.Y. 154 (1915), aff'd *sub. nom. Crane* v. *New York,* 239 U.S. 195 (1915); 3 Am. Jur. 2d § 39, whereas the alien is considered to retain an allegiance to the country of his nationality which the country of residence is bound to respect. *Harisiades* v. *Shaughnessy,* 342 U.S. 580, 585-586 (1951). The alien's allegiance to the country of his nationality is not a matter of individual preference or personal loyalty as the district court suggests but a presumption of international law. *Harisiades* v. *Shaughnessy, supra;* Roth, *supra.* This presumption is recognized by the New York State Constitution Article XIII, Public Officers Law § 10 and Civil Service Law § 62 which require employees of the state or any of its civil divisions, except an employee in the labor class, to take an oath or file a statement pledging that he "will support the Constitution of the United States and the Constitution of the State of New York." The requirement of a similar oath for teachers was upheld in *Knight* v. *Board of Regents,* 269 F. Supp. 339 (S.D.N.Y. 1967, three-judge court), aff'd 390 U. S. 36 (1968).

The career civil service employee is an integral part of the executive branch of government. As in other public

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* 5 C.F.R. §§ 338.101, 302.203(g) (1971); Public Works Appropriations Act of 1970 § 502, Pub. Law 91-144, 83 Stat. 336-7.

roles where citizenship is required,* the civil servant participates directly in the formulation and execution of state and municipal policies. See *United Public Workers* v. *Mitchell*, 330 U.S. 75, 122 (1947) (DOUGLAS, J. dissenting in part). That such activity should be generally entrusted to citizens is appropriate. *Mow Sun Wong* v. *Hampton*, *supra* at p. 9;** *People* v. *Crane*, 214 N.Y. *supra* at 163. The civil servant's involvement with state policy is no less direct or responsible than that of the attorney, *In re Griffiths*, 40 U.S. Law Week 2566 (Conn. Sup. Ct., Feb. 15, 1972), or the juror.

In considering the stable and efficient administration government in relation to the limitation on aliens in the career service, the district court found that the state interest involved was simply an economic one, the hiring and training of new employees to replace departing aliens. This demonstrates an unfortunate lack of perception of the basic interest of democratic government, federal, state and local, in having its business administered by its own citizens. Moreover, the economic theory adopted by the district court is not supported by fact. The civil servant has a variety of rights and obligations which continue throughout the career service period of twenty or twenty-five years.† If he leaves prior to completing the career

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* E.g., U.S. Const., Art. 2 § 1 (the President must be a natural born citizen); Art. 1 § 2 (a Representative must be seven years a citizen, a Senator, nine years a citizen); N. Y. State Const. Art. 4, § 2 (Governor and Lieutenant Governor must be citizens); Art. 3, § 7 (members of the Legislature must be citizens); Art. 2, § 1 (voters must be citizens); N. Y. Public Officers Law § 3 (all public officers must be citizens); N. Y. Judiciary Law § 460 (attorneys must be citizens); Judiciary Law §§ 504(1), 531(3), 596(1), 609(1), 662(1), 684(1) (trial and grand jurors must be citizens).

** Page references are to Memorandum and Order.

† E.g. N.Y. Const. Art. 5, § 6; Civil Service Law §§ 50, subd. 1 and 52 (competitive examinations required to determine merit and fitness for original appointment and promotions); § 61 (requiring the selection of one of every three applicants on eligible lists when appointments are made); § 65 (establishing a preference in available

(*footnote continued on following page*)

period, the State and local governments do not necessarily suffer financially. Indeed, they may benefit financially through lower current payrolls and lower long-term retirement obligations.* However, in exchange for tenure and other benefits granted to career employees, the State and local governments seek administrative continuity and thus the long-term employee. In establishing eligibility requirements for such positions, the Legislature could properly distinguish between the citizen who could be expected to remain available over the long-term and the alien who could be fairly assumed to retain a strong affiliation with the country of his nationality and who is subject to expulsion. 8 U.S.C. § 1251; *Carlson* v. *Landon*, 342 U.S. 524, 535 (1951).

That the State of New York has not foreclosed aliens from all public employment does not invalidate the instant classification. Plainly, State and local governments must have a sufficient number of employees to conduct their business, Civil Service Law § 53, subd. 2, and can reserve the right to appoint aliens on an individual basis to temporary, non-tenured positions, Civil Service Law §§ 41, 42. It is to be noted that if an alien is appointed to the competitive class, § 53, subd. 2 provides that he "shall not be eligible for continued employment unless he diligently prosecutes the procedures for citizenship."

(*footnote continued from previous page*)

positions for candidates successful in examination as against provisional appointees); § 75 (requiring a hearing for removal or other penalty on charges of misconduct or incompetence); § 76 (establishing a right to administrative appeal following disciplinary proceedings); and §§ 80 and 81 (establishing seniority preference in the event of abolition or consolidation of positions and for reinstatement.) See also N.Y. Retirement Law establishing the New York State Employees Retirement System and N.Y.C. Administrative Code § B83-1.0 et seq. establishing the N.Y.C. Employees' Retirement System. Both systems provide for mandatory membership for competitive class employees.

* The current State and N.Y.C. policies of "attrition" are illustrative.

2. The holding of the district court that § 53 could be sustained under the Equal Protection Clause only if it was supported by a compelling state interest was in error. The appropriate standard is one of "close judicial scrutiny" or "necessary relation to a legitimate state interest."

Graham v. *Richardson, supra* at 372, established that classifications based on alienage were to receive "close judicial scrutiny" under the Equal Protection Clause. *Graham* does not hold that "close judicial scrutiny" is synonymous with the "compelling state interest" test reserved for classifications which penalize the exercise of specific constitutional or fundamental rights. *Shapiro* v. *Thompson,* 394 U.S. 613, 634 (1969). There is no constitutional or fundamental right to public employment. *Bailey* v. *Richardson,* 182 F. 2d 46, 57 (D.C. Cir. 1950), aff'd 341 U.S. 918 (1950); *Taylor and Marshall* v. *Beckham,* 178 U.S. 534 (1900); *Ex Parte Sawyer,* 124 U.S. 200 (1888); *Butler* v. *Commonwealth of Pennsylvania,* 51 U.S. (10 How.) 402 (1890); *Crenshaw* v. *U.S.,* 134 U.S. 99 (1890). See also *Cafeteria and Restaurant Workers* v. *McElroy,* 367 U.S. 886, 895-899 (1960).

Unlike welfare where limitations on eligibility deprive the individual of the necessities of life, *Graham* v. *Richardson, supra* at 380, the instant case presents only a transitory limitation applicable to one class of public employment. The public employer has been traditionally afforded broad latitude in qualifying its employees, *United Public Workers* v. *Mitchell,* supra; *Kem* v. *United States,* 177 U.S. 290 (1900); *Bailey* v. *Richardson, supra,* even where its regulations have touched upon such fundamental freedoms as the employee's right to participate in the political process. *United Public Workers* v. *Mitchell, supra.* As stated there: "For the regulation of employees it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service." 330 U.S. *supra* at 101.

Reference to the cases cited in *Graham* to support "close judicial scrutiny" do not identify that standard with the compelling state interest test. *Graham* v. *Richardson, supra* at 372 n. 5 and n. 6. At the outset, it is to be noted that the cases cited involve nationalities* or race,† not alienage. See *In re Griffiths, supra.* None employs the phrase "compelling state interest" except *Oyama* v. *California, supra,* which invalidated a statute that discriminated against United States citizens on the basis of national origin. *Korematsu* and *Hirabayashi* sustained war measures against resident Japanese although subjecting them to "rigid scrutiny". *Korematsu* v. *United States, supra* at 216. *Bolling* v. *Sharpe, supra* at 499, 500, examined racial segregation in the District of Columbia "with particular care" rejecting it as not "reasonably related to any proper governmental objective." *McLaughlin and Loving* invalidated criminal statutes prohibiting cohabitation between Negroes and Whites and miscegenation respectively holding that racial classifications could be sustained only if shown to to "necessary" to the accomplishment of some permissible state objective independent of racial discrimination. *McLaughlin* v. *Florida, supra,* at 196; *Loving* v. *Virginia, supra,* at 11.

The recent federal decisions in *Jalil* v. *Hampton, supra,* and *Mow Sun Wong* v. *Hampton, supra,* have not applied the compelling state interest test to the exclusion of aliens from federal public employment. In *Jalil,* the court takes note of the district court opinion herein and states that "special justification" must be shown by the federal government as well as by the states. However, the court cites Circuit Judge Lumbard's concurrence on this point requiring a "reasonable relationship" between a citizen-

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* *Oyama* v. *California,* 332 U.S. 663 (1948); *Korematsu* v. *United States,* 323 U.S. 214 (1944); *Hirabayashi* v. *United States,* 320 U.S. 81 (1943).

† *Loving* v. *Virginia,* 388 U.S. 1 (1967); *McLaughlin* v. *Florida,* 379 U.S. 184 (1964); *Bolling* v. *Sharpe,* 347 U.S. 497 (1954).

ship and the "special demands of a particular position." In *Mow Sun Wong, supra,* at p. 9, the court specifically rejects the application of the compelling state interest test and adopts instead the traditional standard of reasonable relation to a permissible interest.

The holding in *Graham* under the Equal Protection Clause is supported by the Court's finding that the state's interest in limiting expenditures was an insufficient basis for denying aliens equal access to welfare benefits. This result is reached under the "close judicial scrutiny" standard without the necessity of determining whether or not the state interest advanced is "compelling." See e.g. *Tokahashi* v. *Fish & Game Commission,* 334 U.S. 410 (1948), holding that California's interest in the fish swimming in its coastal waters was insufficient to justify excluding Japanese and a few other racial minorities without invoking the compelling state interest test. At a minimum, the standard herein cannot be more stringent than that applied to the racial classifications in *McLaughlin* and *Loving* requiring "necessary" relation to a legitimate state interest.

3. Section 53 does not conflict with a comprehensive federal plan for the immigration and naturalization of aliens. Neither the Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 et seq., nor 42 U.S.C. § 1981 pre-empt the field of state and local employment of aliens.

The provisions of the Immigration and Nationality Act relating to the employment of aliens are few and relate solely to the work the alien will perform upon entry to the United States.* Unlike the multiple and continuing provisions regarding the pauperism of aliens cited in *Graham* v. *Richardson, supra* at 377-378, the provisions relating to alien employment do not establish a comprehensive plan.

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*8 U.S.C. §§ 1153(a)(3), (a)(6), 1182(a)(14).

Appellees' principal reliance must be placed in 8 U.S.C. § 1182(a)(14) which provides that alien may enter the United States to perform skilled or unskilled labor only if the Secretary of Labor certifies, at the time of the alien's visa application that there are not sufficient qualified workers performing such skilled or unskilled labor at the alien's destination and that his employment will not adversely affect the wages and working conditions of laborers already in the United States. The record herein establishes that the Appellees' positions in public employment were not the positions for which they were certified upon entrance to the United States. Further, it is uncontested that under the certification schedules in effect since at least 1965, Appellees would not have been admitted to the United States for the positions which they held with the City of New York or even for similar positions in the private sector. 29 C.F.R. Part 60, §§ 60.2(a)(1), (a)(2) and Schedule A at p. 152 and Schedule B at p. 154 (1971). Thus, the Immigration and Nationality Act and the regulations enacted pursuant thereto do not consider the working life of the alien in the United States, and therefore cannot be viewed as a comprehensive plan. Even assuming that the federal legislation and regulations look toward this area, there can be no "conflict" with § 53 which produces the identical result as the federal enactments in this case. *Florida Avocado Growers* v. *Paul*, 373 U.S. 132, 141-152 (1963); *Swift* v. *Wickham & Co., Inc.*, 230 F.Supp. 398, 406 (S.D.N.Y. 1964), aff'd 364 F. 2d 241 (2d Cir. 1966), cert. den. 385 U.S. 1036 (1967). Compare *Purdy & Fitzpatrick Co.* v. *State*, 79 Cal. Rptr. 77, 452 P. 2d 645, 651 (1969).

Reliance on 42 U.S.C. § 1981 as precluding the enforcement of § 53 is similarly inapposite. In *Takahashi* v. *Fish & Game Commission, supra* at 420, this Court held specifically that § 1981 did not preclude the state from enacting legislation applicable "exclusively to its alien inhabitants as a class" although the Court noted that the state's power

in this regard was "confined within narrow limits." The area of competitive class public employment is within those "narrow limits." Congress has not indicated any intention of dictating to the state whom it shall employ to execute its sovereign will. See *Maryland* v. *Wirtz*, 392 U.S. 183, 196 (1968) (and opinion of *Douglas*, J. dissenting at 201, 205). The instant case is in marked contrast to *Hines* v. *Davidowitz*, 312 U.S. 52, 66-67 (1940) wherein Pennsylvania continued to enforce an extensive alien registration act following enactment of a similar federal statute applicable to all aliens residing in the United States.

4. Section 53 does not erect an obstacle to aliens entering and abiding within the State of New York inconsistent with federal policy. Federal policy excludes aliens from public employment and is substantially identical with that of the State of New York.

The limitations on the employment of aliens by the federal government are substantially identical with those embodied in § 53. See discussion, *infra* at pp. 12, 15. Accordingly, § 53 cannot be regarded as inconsistent with the federal policy regarding the entrance and abode of aliens.

The district court relied on *Traux* v. *Raich*, 239 U.S. 33 (1915) and *Graham* v. *Richardson*, *supra*, in holding that § 53 denied aliens the right to enter and abide in New York State. In *Traux*, the Court invalidated an Arizona statute which barred aliens from the "entire field of industry with the exception of enterprises that are relatively very small," 239 U.S. *supra* at 40, stating that the authority of the state did not extend to denying aliens "the ordinary means of earning a livelihood * * * in the common occupations of the community. * * *" 239 U.S. *supra* at 41. *Traux* was not concerned with the narrow and transitory limitation here in issue. Moreover, the Court did not hold that public employment was among the common occupations of the community. *Traux* v. *Raich*, *supra* at 40.

Indeed, in the cases decided with *Traux, Heim* v. *McCall*, 239 U.S. 175 (1915) and *Crane* v. *New York, supra*, the Court sustained limitations in aliens in public employment. In *Graham* v. *Richardson, supra* at 376-380, the Court was concerned with statutes which conditioned the necessities of life on citizenship or an alien's residence within the state for fifteen years, and not with the transitory limitation of, at best, arguable impact embodied in § 53. In *Graham*, the statutes and record supported the presumption that the alien could not reside in a state that so conditioned his ability to secure the necessities of life. The operation of § 53 does not support the same presumption herein.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court note probable jurisdiction and grant plenary consideration to the instant appeal.

Dated: New York, New York, March 24, 1972.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellant
State of New York

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

JOEL LEWITTES
JUDITH A. GORDON
Assistant Attorneys General
of Counsel

APPENDIX "A"

Opinion and Order of Single District Judge.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MEMORANDUM

PATRICK MCL. DOUGALL, ESPERANZA JORGE, TERESA VARGAS, and SYLVIA CASTRO, individually and on behalf of all other persons similarly situated,

Plaintiffs,

against

JULE M. SUGARMAN, Administrator of New York City Human Resources Administration and HARRY I. BRONSTEIN, City Director of Personnel and Chairman of the New York City Civil Service Commission,

Defendants.

71 CIVIL 992

APPEARANCES

For Plaintiffs:

Mobilization for Youth Legal Services, Inc.
759—10th Avenue
New York, N. Y.
Lester Evens
Jeffrey G. Stark, Esqs.—of Counsel.

For Defendants:

J. Lee Rankin, Esq.
Corporation Counsel of The City of New York
Municipal Building
New York, N. Y. 10007

Judith A. Gordon, Esq.—of Counsel.

Appendix "A"

TENNEY, J.

Plaintiffs, individually and on behalf of all others similarly situated,[1] move this Court pursuant to 28 U.S.C. §§ 2281 and 2284 for an order convening a district court of three judges for the purpose of hearing and determining their application for a preliminary and permanent injunction to restrain defendants from continued enforcement of Section 53 of the New York Civil Service Law.[2]

Basing jurisdiction upon 28 U.S.C. §§ 1343(3), (4);[3] 42 U.S.C. § 1983, and 28 U.S.C. § 1331, plaintiffs seek to prevent defendants from depriving them of their rights as "person[s] . . . [entitled to] . . . due process of law . . . [and] equal protection of the laws" under the Fourteenth Amendment to the United States Constitution. Furthermore, plaintiffs contend that defendants' enforcement of Section 53 denies aliens the right to travel within the United States and encroaches upon the exclusive right of Congress to regulate immigration and naturalization.

In substance, plaintiffs claim that Section 53, which makes non-citizens ineligible for appointment to any position in the competitive class of civil service in New York City, discriminates against aliens residing in the City. More specifically, plaintiffs urge that their discharge from employment merely because they are not American citizens violated their rights to due process and equal protection under the Fourteenth Amendment since American citizens admittedly would not have been discharged.[4] *Yick Wo* v. *Hopkins,* 118 U. S. 356 (1886). It is further contended that enforcement of Section 53 infringes upon plaintiffs' right to travel among the states, as that right has been recognized in *United States* v. *Guest,* 383 U. S. 745 (1965) and *Truax* v. *Raich,* 239 U. S. 33 (1915). Finally, Section 53 is viewed by plaintiffs as encroaching upon the Congressional scheme for immigration and naturalization and hence must be declared void. *Truax* v. *Raich,*

supra; Purdy & Fitzpatrick v. *State,* 79 Cal. Rptr. 77, 456 P.2d 645, 653 (1969).

Defendants, on the other hand, cross-move for dismissal of the within action on the grounds this Court lacks subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343 (3), (4). In addition, defendants contend that no substantial federal question requiring the convening of a three-judge court is presented by the within complaint.

We turn first to the motion to dismiss which, if granted, would dispose of the entire action. It appears unlikely that plaintiffs can meet the $10,000 jurisdictional requirement of 28 U.S.C. § 1331, since the claims of the class members, being separate and distinct, may not be added together. *Snyder* v. *Harris,* 394 U. S. 332 (1969); *Cataleno* v. *Dep't of Hospitals,* 299 F. Supp. 116, 169 (S.D.N.Y. 1969). Furthermore, since the salary of the highest paid discharged member of the class is $12,100 per annum and, as of the filing of the complaint, no member of the class had been off the payroll for more than three weeks, it is clear that no individual class member can presently meet the $10,000 requirement. Moreover, if any class member is subsequently employed by a private employer he may never reach the requisite amount since his lost wages will never reach $10,000. Finally, it is doubtful whether the future lost wages of which the individual class members may be deprived could be considered by this Court in computing the amount in controversy. *Cf. Eisen* v. *Eastman,* 421 F.2d 560, 566 (2d Cir. 1969); *Kochhar* v. *Auburn Univ.,* 304 F. Supp. 565, 567 (D.C. Ala. 1969).

I find defendants' reliance on *Tichon* v. *Harder,* Docket No. 35151 (2d Cir. Feb. 18, 1971), for dismissing the within action for lack of jurisdiction under 28 U.S.C. § 1343(3), misplaced. In that case, the plaintiff, a case worker in the Connecticut Department of Welfare, claimed she was denied procedural due process when the State fired her. The Court of Appeals, in affirming the dismissal of that

action, held that § 1343(3) did not provide jurisdiction since only rights of personal liberty can be asserted under that section when one claims he has been denied procedural due process. "[T]he claim that appellant was denied procedural due process has no independent jurisdictional significance. . . ." *Tichon* v. *Harder, supra* at 1550. Clearly, the loss of employment is a property right vis-a-vis a right of personal liberty. However, plaintiffs contend not merely that they were denied procedural due process, but that they were also denied equal protection of the laws when the City discriminated against them. This, of course, involves a matter of personal liberty. *See Arrington* v. *Massachusetts Bay Transp. Auth.*, 306 F. Supp. 1355 (D. Mass. 1969). To hold otherwise would permit the City to dismiss an employee because of his race and yet offer him no opportunity for redress in the federal courts unless the matter in controversy satisfied the $10,000 jurisdictional requirement of § 1331. Furthermore, such a holding would fly in the face of the very language of § 1343 (3) and that of the Fourteenth Amendment.

I conclude, therefore, that this Court does in fact have jurisdiction, under 28 U.S.C. § 1343(3), of the instant action. *Madison* v. *Wood*, 410 F.2d 564, 567 (6th Cir. 1969); *Penn* v. *Stumpf*, 308 F. Supp. 1238, 1244-46 (N.D. Cal. 1970); *cf. Davenport* v. *Berman*, 420 F.2d 294, 296 (2d Cir. 1969).

The next issue is whether the plaintiffs' complaint raises a substantial constitutional question necessitating the convening of a three-judge court. In a recent unanimous decision, *Purdy & Fitzpatrick* v. *State*, 79 Cal. Rptr. 77, 456 P. 2d 645 (1969), the California Supreme Court held that a state statute prohibiting the employment of aliens on public works was unconstitutional in that it: (1) offended the equal protection clause of the Fourteenth Amendment of the United States Constitution, and (2) interfered with the Congressional scheme for immigration

and naturalization. There has also been a recent adoption of stricter standards of judicial review in cases dealing with "suspect classifications" or "fundamental interests". *Keyishian* v. *Bd. of Regents,* 385 U. S. 589 (1967); *Takabashi* v. *Fish & Game Comm.,* 334 U. S. 410, 420 (1948); *Hawkins* v. *Town of Shaw,* 39 U.S.L.W. 2431 (5th Cir. Feb. 9, 1971); *see generally, Developments in the Law—Equal Protection,* 82 Harv. L. Rev. 1065 (1969). Under this standard, the state must show the classification is necessary to a compelling state interest, rather than merely demonstrate a reasonable relation between the restriction and any possible valid state interest. Defendants argue, however, that the standard applies only to classifications which penalize the exercise of specific constitutional or fundamental rights and not with respect to public employment. Again, the defendants fail to perceive the gravamen of the instant action—denial of equal protection of the laws. "While there may be no constitutional right to public employment as such, there is a constitutional right to be free from unreasonably discriminatory practices with respect to such employment." *Whitner* v. *Davis,* 410 F.2d 24, 30 (9th Cir. 1969).

In light of the recent ruling of the California Supreme Court and the other noted developments in equal protection, it seems clear that a three-judge court should be convened to consider the substantial constitutional questions presented herein.

Accordingly, I will notify the Chief Judge of this Circuit that a three-judge court ought to be convened pursuant to Section 2284 of Title 28 of the United States Code.

So ordered.

Dated: New York, New York
May 24, 1971.

CHARLES H. TENNEY
U.S.D.J.

Appendix "A"

71 CIVIL 992

Patrick McL. Dougall, Esperanza Jorge, Teresa Vargas, and Sylvia Castro, individually and on behalf of all other persons similarly situated, Plaintiffs,

against

Jule M. Sugarman, Administrator of New York City Human Resources Administration, and Harry I. Bronstein, City Director of Personnel and Chairman of the New York City Civil Service Commission, Defendants,

FOOTNOTES

[1]Pg. 1. The determination as to whether the case is appropriately brought as a class action and, if so, the propriety of the definition of the class, is deferred for decision by the three-judge court.

[2] Pg. 2. N.Y. CIVIL SERVICE LAW § 53 (McKinney 1970)

"Citizenship requirements.

1. Except as herein otherwise provided, no person shall be eligible for appointment for any position in the competitive class unless he is a citizen of the United States.

2. . . ."

[3] Pg. 3. 28 U.S.C. § 1343, in pertinent part, provides:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1). . . .

(2). . . .

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

[4] Pg. 3. The relevant language of the Fourteenth Amendment provides:

"[N]or [shall any State] deny to any *person* within its jurisdiction the equal protection of the laws." (Emphasis supplied.)

APPENDIX "B"

Opinion of Three-Judge District Court.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

PATRICK McL. DOUGALL, ESPERANZA JORGE, TERESA VARGAS, And SYLVIA CASTRO, individually and on behalf of all persons similarly situated,

Plaintiffs,

against

JULE M. SUGARMAN, Administrator of New York City Human Resources Administration, and HARRY I. BRONSTEIN, City Director of Personnel and Chairman of the New York City Civil Service Commission,

Defendants.

Three-Judge Court

J. Edward Lumbard, C. J.
Edward C. McLean, D. J.
Charles H. Tenney, D. J.

APPEARANCES:

For Plaintiffs:

Mobilization for Youth Legal Services, Inc.
759—10th Avenue
New York, N. Y.

Lester Evens
Jeffrey G. Stark, Esqs.—of Counsel.

Appendix "B"

For Defendants:

Louis J. Lefkowitz, Attorney General of the State of New York

Joel Lewittes, Esq., Assistant Attorney General—of Counsel.

J. Lee Rankin, Esq., Corporation Counsel of The City of New York
Municipal Building
New York, N. Y.

Judith A. Gordon, Esq.—of Counsel.

TENNEY, *District Judge*

Plaintiffs are four of approximately twenty permanent resident aliens who, prior to December 28, 1970, were employed by private organizations which were merged into the New York City Human Resources Administration on that date. The City program was directed to the improvement of job skills among the unemployed and the underemployed. When the private organizations were merged into the City program, plaintiffs were hired by the City and assured their positions and salaries would be the same.[1] Shortly after their City employment commenced, however, plaintiffs were discharged pursuant to New York Civil Service Law § 53.1 (McKinney 1959), solely because of their alienage.[2]

On May 11, 1971, by order to show cause plaintiffs, alleging that Section 53 violated the Equal Protection Clause of the fourteenth amendment, the Supremacy Clause of the Constitution, and their right to travel among the states,[3] moved for the convening of a three-judge court and other relief. The single district judge found plain-

tiffs raised a substantial constitutional question and recommended the convening of a three-judge court. Pursuant to the May 26, 1971 order of Chief Judge Henry J. Friendly, plaintiff's motions for declaratory judgment, injunctive relief and determination of class action[4] were submitted to this statutory three-judge court which heard argument on July 13, 1971.[5]

The issues raised by the instant action were recently the subjects of *Graham* v. *Richardson*, 403 U. S. 365 (1971), in which the Supreme Court held that state laws conditioning welfare assistance either on United States citizenship or, if the beneficiary was an alien, upon his having resided in the United States for a specified number of years were invalid. The rationale and holding of *Graham* control the outcome of plaintiffs' challenge to Section 53.

The fourteenth amendment provides "nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws", and the Equal Protection Clause has long been held to apply to aliens as well as citizens. *E.g., Yick Wo* v. *Hopkins*, 118 U. S. 356, 369 (1886). Of course, a state has traditionally been permitted to make classifications provided these have a reasonable basis. *E.g., Dandridge* v. *Williams*, 397 U. S. 471, 485 (1970). Nevertheless, when a state's classification either impinges upon a fundamental right, *Shapiro* v. *Thompson*, 394 U. S. 618 (1969), or is based upon an inherently suspect classification such as race, nationality or alienage, that classification is subject to "close judicial scrutiny". *Graham, supra* at 372. Inasmuch as defendants have failed to demonstrate a compelling interest which would justify the classification created by Section 53, the statute violates the Equal Protection Clause of the fourteenth amendment.

The City and State attempt to justify their refusal to allow aliens the opportunity to compete for employment in the competitive class of civil service (hereinafter referred to as "CCCS") on two grounds: (1) a government

is entitled to conduct its affairs through the agency of persons with undivided loyalty, and (2) Section 53 is properly related to efficient and stable government administration.

Since defendants neither elaborate on their loyalty argument nor contend that aliens, as persons with dual allegiance, are security risks,[6] it would appear that this justification is an application of the special public interest doctrine which is a phrase to describe the state's restricting the distribution of its limited resources to its own citizens. *"Takahashi* v. *Fish & Game Commission,* 334 U. S. 410 (1948), however, cast doubt on the continuing validity of the special public interest doctrine *in all contexts." Graham, supra* at 374 (emphasis supplied); *accord, Purdy & Fitzpatrick* v. *State,* 79 Cal. Rptr. 77, 456 P.2d 645, 657-58 (1969).

The Court in *Graham, supra* at 374, concluded that an alien's constitutional right to equal protection could not be made to depend upon the concept that government benefits were a privilege, not a right, which is the basis of the special public interest doctrine, see *People* v. *Crane,* 214 N.Y. 154, 164, 108 N.E. 427, 430, *aff'd,* 239 U. S. 195 (1915), especially since resident aliens are subject to the same obligations as citizens, such as taxes and military service. *Accord, Purdy & Fitzpatrick,* 456 P.2d at 656. The arbitrariness and unfairness of denying aliens the employment benefits of the City and State are even more apparent when one realizes that an alien who may have resided in New York for a number of years and contributed to its growth and development is denied the opportunity to compete for employment in CCCS whereas any *United States citizen* (vis-a-vis an American citizen residing in New York) who may not be or have ever been a New York resident and, accordingly, may not have made any contribution to it, is eligible for such employment. *Purdy & Fitzpatrick,* 456 P.2d at 656. Therefore, without a showing by defendants

that the "loyalty" requirement bears a relationship to a compelling interest of the City and State, it violates the Equal Protection Clause.

The second justification for Section 53—that it is properly related to efficient and stable government administration—also does not withstand "close judicial scrutiny". Defendants contend that an alien is less likely to remain in the United States during his employment life than is an American citizen and, thus, if an alien is hired into a "career" position of CCCS, a decision to return to his homeland will adversely affect the efficiency and stability of the administration of the governments of the City and State. However, this argument of defendants is inapposite since it is primarily concerned with whether or not a "career" employee is likely to remain in the United States rather than in New York. There is no offer of proof on this issue and defendants would be hard pressed to demonstrate that a permanent resident alien who has resided in New York or the surrounding area for a number of years, as have plaintiffs, and whose family also resides here, would be a poorer risk for a career position in *New York* (vis-a-vis in the United States) than an American citizen who, prior to his employment with the City or State, had been residing in another state. Judicial notice can be taken of the mobility of today's society and of the numerous persons who flock to places such as New York City and Washington, D.C. for relatively short stays in order to gain valuable experience through government employment or for the adventure and glamour those cities offer. Inasmuch as the defendants do not attempt to distinguish among United States citizens in their hiring of "career" employees, their argument for discriminating against aliens is not valid. Assuming, *arguendo*, that it were valid, it still cannot withstand the requirements of the fourteenth amendment as enunciated in *Graham*.

This efficiency argument of the City and State is an economic one—if the defendants hire aliens into career positions and the aliens eventually quit and return to their homelands, new employees will have to be hired and trained to replace the experienced and therefore more efficient departed aliens; all of which costs defendants money. Again, however, as pointed out above in response to the "loyalty" argument, aliens pay taxes and often contribute to the welfare of the city and state in which they reside—certainly more than do American citizens residing in another state or section of the country and, therefore, discriminating against aliens on economic grounds is particularly inappropriate. Furthermore, a state may not attempt to limit expenditures by creating invidious distinctions among persons within the state without violating the Equal Protection Clause, and the Supreme Court in *Graham, supra* at 375, so held: "[A] concern for fiscal integrity is no . . . justification for the questioned classification in these cases. . . ."

Although *Graham* did not explicitly overrule two early Supreme Court cases, *Crane* v. *New York*, 239 U. S. 195 (1915); *Heim* v. *McCall*, 239 U. S. 175 (1915), which are admittedly factually similar to the instant action and which upheld a New York statute prohibiting employment of aliens on public works, they are no longer controlling. In *Purdy & Fitzpatrick, supra,* the California Supreme Court was faced with a challenge to a statute virtually identical to that in *Crane* and *Heim* and unanimously held that the statute was violative of the Equal Protection Clause. In doing so, the court concluded that the original basis for the result in *Heim* was invalid and that recent developments in the law of equal protection had removed whatever validity *Heim* had at the time of its decision and that *Takahashi* warranted the rejection of such cases as *Heim* and *Crane*. If there were any doubt about the legitimacy of that California decision, it should have been put

to rest by *Graham* which also strongly criticized the rationale of *Crane* and *Heim* and rejected it as a basis for denying welfare benefits to aliens. Taken together, *Graham* and *Takahashi* sufficiently weaken the value of *Crane* and *Heim* as precedents for upholding state laws denying aliens government employment and, therefore, those cases can be viewed as implicitly overruled and no longer law. That *Graham* did not explicitly overrule *Crane* and *Heim* can be viewed only as reflecting an intention to defer such action until faced with a proper factual setting in which states were given an opportunity to present their justifications for denying aliens employment opportunities. We are now faced with such a case and the City and State have failed to offer sufficient justification for Section 53; accordingly, we have adopted the reasoning of *Graham* and hold Section 53 violative of the Equal Protection Clause.

In the opinion of this Court, Section 53 is also unconstitutional because it conflicts with the Supremacy Clause of the Constitution. Specifically, Congress has enacted a comprehensive plan for the regulation of immigration and naturalization and has granted to aliens through 42 U.S.C. §1981 (1970)' the full and equal benefits of all laws in this country. "Moreover . . . [the Supreme] Court has made it clear that . . . aliens lawfully within this country have a right to enter and abide in any State in the Union 'on an equality of legal privileges with all citizens under nondiscriminating laws.' *Takahashi*, 334 U. S. at 420." *Graham, supra* at 377-78. Relying on these premises, the court in *Graham* concluded that state laws restricting the eligibility of aliens for welfare assistance solely because of their alienage conflicted with the federal policy and hence were unconstitutional. Section 53 is invalid for these same reasons.

Appendix "B"

In *Truax* v. *Raich*, 239 U. S. 33, 42 (1915), the court reasoned:

> "The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government. . . . The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. And, if such a policy were permissible, the practical result would be that those lawfully admitted to the country under the authority of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the States as chose to offer hospitality." *Accord, Graham, supra* at 14.

In quoting the above language from *Truax* with approval, the court in *Graham, supra* at 15, held:

> "State alien residency requirements, that either deny welfare benefits to noncitizens or condition them on longtime residency, equate with the assertion of a right, inconsistent with federal policy, to deny entrance and abode. Since such laws encroach upon exclusive federal power, they are constitutionally impermissible."

Just as the laws in *Truax* and *Graham* equated with a right in the states to admit and exclude aliens, an exclusively federal right, Section 53 encroaches upon this exclusively federal power and denies aliens the "full and equal benefit of all laws for the security of persons and property". Since the federal government has preempted the field in the case of denying aliens welfare assistance,

it has done so in the instant one. Any alien who would be discouraged from residing in a state because it either denied or conditioned upon long-term residency his right to welfare assistance would likewise be discouraged from residing in New York because of Section 53. Such an alien could logically conclude that his best or possibly his only opportunity for equal opportunity employment would be with the governments of the City and State, and to him Section 53 would constitute a serious obstacle to either his entrance and/or abode in New York. In fact, Section 53 could be viewed as reflective of a more pervasive state policy to discriminate against aliens and hence to have established additional artificial barriers to the entrance and abode of aliens.

In sum, Section 53 is tantamount to an assertion by New York City and the State of New York of the right to deny aliens entrance and abode—a right that is exclusively federal. Furthermore, Section 53 is clearly violative of 42 U.S.C. § 1981 (1970) in that it denies aliens the equal benefits of the laws of New York as are enjoyed by white citizens. In light of the language of *Graham*, this Court is constrained to find that Section 53 also conflicts with the Supremacy Clause and is unconstitutional, and enforcement of it will be enjoined.

Accordingly, plaintiff's motion for class action, preliminary and permanent injunctive and declaratory relief is hereby granted.

Settle order on notice.

Dated: New York, New York
November 9, 1971.

J. EDWARD LUMBARD
C.J.

EDWARD C. McLEAN
D.J.

CHARLES H. TENNEY

Appendix "B"

LUMBARD, *Circuit Judge* (concurring)

I concur in Judge Tenney's opinion. The city and state have offered no justification for New York Civil Service Law § 53 that can stand in light of the Supreme Court's opinion in *Graham* v. *Richardson*, 403 U. S. 365 (1971). I think that the "special public interest" doctrine and the Court's earlier decisions in *Heim* v. *McCall*, 239 U. S. 175 (1915), and *Crane* v. *New York*, 239 U. S. 195 (1915), can no longer be viewed as controlling in light of the Court's language in *Graham* v. *Richardson, supra*, and *Takahashi* v. *Fish & Game Commission*, 334 U. S. 410 (1948). Not only does Section 53 run afoul of the Equal Protection Clause, but it conflicts both with 42 U.S.C. § 1981 (1970) and the federal government's general power over the immigration and naturalization of aliens. *See Graham* v. *Richardson, supra*, at 376-80.

While the question we decide today is an important one, it is equally important to recognize those areas into which the Court's holding does not extend. Nothing in our decision should be construed to mean that a state may not lawfully maintain a citizenship requirement for those positions where citizenship bears some rational relationship to the special demands of the particular position. There are some positions in the civil service, as in elective office, where broad policy decisions are made as a matter of course, and in such positions the state and the city, and their citizens, may properly require the officeholder to be a United States citizen.

Appendix "B"

71 CIVIL 992

Patrick McL. Dougall, Esperanza Jorge, Teresa Vargas, and Sulvia Castro, individually and on behalf of all persons similarly situated, Plaintiffs,

against

Jule M. Sugarman, Administrator of New York City Human Resources Administration and Harry I. Bronstein, City Director of Personnel and Chairman of the New York City Civil Service Commission, Defendants.

FOOTNOTES

[1] Pg. 2 Plaintiffs Jorge and Vargas were employed as clerk-typists; plaintiff Castro as a senior human resources technician; and plaintiff Dougall as an administrative assistant in the staff development unit.

[2] Pg. 2. Section 53.1 provides:

"Except as herein otherwise provided, no person shall be eligible for appointment for any position in the competitive class unless he is a citizen of the United States."

[3] Pg. 2. We have not found it necessary to reach the question whether aliens have a constitutional right to travel among the states.

[4] Pg. 2. Plaintiffs' motion for class action determination is granted; the class shall consist of all permanent resident aliens residing in New York State who, but for the enforcement of Section 53, would otherwise be eligible to compete for employment in the competitive class of Civil Service.

[5] Pg. 2. Jurisdiction of this court is based upon 28 U.S.C. § 1343 (3) and (4). Reference is also made to 42 U.S.C. §§ 1981 and 1983, 28 U.S.C. §§ 2201, 2281 and 2284.

[6] Pg. 4. Defendants would be on particularly shaky ground if they were to argue that aliens were ineligible for employment in CCCS because they are security risks. In fact, defendant argued in support of Section 53's validity that plaintiffs, as aliens, were eligible for other government employment in the generally higher paying and more responsible appointive positions, as well as in the labor

class. E.g., N.Y. Civil Service Law §§ 35, 41, 42 and 43 (McKinney 1959). Furthermore, Section 53.2 specifically allows the state to temporarily waive the citizenship requirements during a shortage of qualified citizens. In light of the availability of more responsible positions to aliens and that defendants may waive the citizenship requirements when it suits their needs, it would be incongruous to contend that aliens were denied employment in CCCS because their dual allegiance constituted a security risk to the City and State.

[7] Pg. 8. 42 U.S.C. § 1981 (1970) provides:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to . . . the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens. . . ."

This provision was previously 8 U.S.C. § 41, a section of that title of the United States Code dealing with Aliens and Nationality. It is also clear that 8 U.S.C. § 41 extended to aliens as well as citizens. *Takahashi*, 334 U. S. at 419.

[8] Pg. 10. There is language in *Truax*, 239 U. S. at 41, which implies that states may deny some employment opportunities to aliens without invading this exclusive federal authority as long as it does not foreclose nearly the entire field of industry. Defendants then argue that since they employ only about 5 per cent of the state workforce, Section 53 is valid. However, the facts of *Sailer* v. *Leser*, the companion case to *Graham*, clearly demonstrate that a state law need have very little actual impact on aliens before it constitutes an impermissible encroachment upon the exclusive federal power to admit and exclude aliens. In *Sailer*, the class of persons actually affected by the denial of welfare assistance represented only 65-70 cases annually. Certainly Section 53 imposes at least as great an obstacle to the entrance and abode of aliens as did the statute in *Sailer*, since there are apparently in excess of 500,000 aliens residing in New York. *Plaintiffs' Brief* at 7.

APPENDIX "C"

Order of Three-Judge District Court.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

PATRICK McL. DOUGALL, ESPERANZA JORGE, TERESA VARGAS and SYLVIA CASTRO, individually and on behalf of all persons similarly situated,

Plaintiffs,

against

JULE M. SUGARMAN, Administrator of New York City Human Resources Administration, and HARRY I. BRONSTEIN, City Director of Personnel and Chairman of the New York City Civil Service Commission,

Defendants.

Three-Judge Court

J. Edward Lumbard, C.J.
Edward C. McLean, D.J.
Charles H. Tenney, D.J.

This cause having come to be heard before a statutory three-judge court convened pursuant to 28 U.S.C. § 2281 by order of the Honorable Henry J. Friendly, Chief Judge of the Second Circuit Court of Appeals, dated May 26, 1971, and consisting of the Honorable J. Edward Lumbard, Circuit Judge, the Honorable Edward C. McLean, District Judge, and the Honorable Charles H. Tenney, District Judge, on plaintiffs' motion for an order determining that this action may proceed as a class action declaring N.Y. Civil Service Law § 53 unconstitutional and enjoining en-

forcement thereof; and the three-judge court having considered the pleadings, affidavits and briefs submitted on behalf of the parties, having heard oral argument on July 13, 1971, and having rendered its decision in an opinion dated November 9, 1971, it is

ORDERED that plaintiffs Dougall, Jorge and Vargas are representatives of a class consisting of all permanent resident aliens who, but for the enforcement of N.Y. Civil Service Law § 53, would otherwise be eligible to compete for employment in the competitive class of civil service; and it is further

ORDERED that N.Y. Civil Service Law § 53 is declared unconstitutional; and it is further

ORDERED that defendants, their successors in office, agents and employees and all other persons in active concert with them are permanently enjoined from enforcing N.Y. Civil Service Law § 53; and it is further

ORDERED that this three-judge court is hereby dissolved and all claims for relief are remanded to the single district judge to whom the motion for the convening of a three-judge court was originally presented, the Honorable Charles H. Tenney; and it is further

ORDERED that execution of this order is stayed pending a timely appeal by the defendants to the United States Supreme Court.

Dated: New York, New York
December 23, 1971.

J. EDWARD LUMBARD, C.J.
EDWARD C. MCLEAN, D.J.
CHARLES H. TENNEY, D.J.

APPENDIX "D"

Notice of Appeal of State of New York.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

71 CIV 992

PATRICK MCL. DOUGALL, ESPERANZA JORGE, TERESA VARGAS and SYLVIA CASTRO, individually and on behalf of all persons similarly situated,

Plaintiffs,

against

JULE M. SUGARMAN, Administrator of New York City Human Resources Administration, and HARRY I. BRONSTEIN, City Director of Personnel and Chairman of the New York City Civil Service Commission,

Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given to the plaintiffs above-named that Louis J. Lefkowitz, Attorney General of the State of New York, hereby appeals to the Supreme Court of the United States from the final order granting plaintiffs' motion for class action, preliminary and permanent injunctive and declaratory relief entered in this action on December 23, 1971.

Appendix "D"

The appeal is taken pursuant to 28 U.S.C. § 1253.

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York

By

s/ JOEL LEWITTES
JOEL LEWITTES
Assistant Attorney General
80 Centre Street
New York, New York 10013
Tel. No. (212) 488-3284

To: MOBILIZATION FOR YOUTH LEGAL SERVICES, INC.
Attorneys for Plaintiffs
759 Tenth Avenue
New York, New York

HON. J. LEE RANKIN
Corporation Counsel of the City of New York
Attorney for Defendants
Municipal Building
New York, New York 10007

Att: Judith A. Gordon, Esq.
Assistant Corporation Counsel

Filed January 19, 1972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1222

JULE M. SUGARMAN, Administrator of the New York City Human Resources Administration and HARRY I. BRONSTEIN, City Director of Personnel and Chairman of the New York City Civil Service Commission,

Appellants,

against

PATRICK MC. L. DOUGALL, ESPERANZE JORGE, TERESA VARGAS, and SYLVIA CASTRO, individually and on behalf of all others similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney *Pro Se*
80 Centre Street
New York, New York 10013

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

JOEL LEWITTES
JUDITH A. GORDON
Assistant Attorneys General
of Counsel

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Appellants,

against

PATRICK MC. L. DOUGALL, ESPERANZE JORGE, TERESA VARGAS, and SYLVIA CASTRO, individually and on behalf of all others similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

This brief is submitted in opposition to Appellees' motion to affirm the judgment below pursuant to Rule 16(4) of the Rules of the Supreme Court of the United States.

ARGUMENT

Appellees' contention that prior decisions of this Court dispose of the instant appeal is incorrect. This Court has never adjudicated the State's right to conduct its internal operations through the agency of citizens rather than aliens.

Graham v. *Richardson* and *Sailer* v. *Leger*, 403 U.S. 365 (1971) are "welfare cases", 403 U.S. *supra* at 366, wherein the state statutes considered limited public assistance to citizens or long term alien residents "solely on the basis of a State's 'special public interest' in favoring its own citizens over aliens in the distribution of limited resources such as welfare benefits." 403 U.S. *supra* at 372. The Court specifically reserved consideration of state classifications between aliens and citizens "in other contexts", 403 U.S. *supra* at 374, and thus did not consider the sufficiency of state interests supporting classifications which are unrelated to the state's preservation of its fisc.

The case at bar concerns the right of a state to make citizenship a condition of employment in one class of the civil service,* a matter of internal government operations related to the state's right to be served through the agency of persons of undivided allegiance and with a minimum risk of personnel turnover (Main brief, pp. 12-14). Oaths of allegiance by public employees to the federal and state governments have been repetitively sustained as a legitimate object of state legislation. E.g. *Cole* v. *Richardson*,

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* Appellees repeat the allegation made in the district court that the classes of the civil service which do not limit employment to citizens "involve much higher levels of authority and policy making [than] the competitive class" to which N.Y. Civil Service Law applies (Motion to Affirm, p. 3). There is no basis in the record for this contention (Main brief, pp. 10 (footnote), 14).

40 U.S. Law Week 4381 (4-18-72) (dissents by *Douglas*, J., and *Marshall* and *Brennan*, JJ. pertain to portions of the Massachusetts oath there in issue which are not required by N.Y. Civil Service Law § 62); *Ohlson* v. *Phillips*, 397 U.S. 317 (1970); *Knight* v. *Board of Regents*, 390 U.S. 36 (1968). See also *Law Students Research Council* v. *Wadmond*, 401 U.S. 154, 161-162 and 189-190 (1971).

Further, the force of Appellant's argument that the alien presents an unacceptable risk for career employmnt because he is subject to expulsion from the United States and because of his continuing identification with his country of origin is not diminished by the fact that the State of New York and its political subdivisions may employ citizens who reside in neighboring states (Motion to Affirm, p. 5). Plainly, the state interests presented by the instant appeal cannot be identified with the economic preference condemned in *Graham* v. *Richardson, supra.* Accordingly, *Graham* cannot be utilized as the basis for summary affirmance of the district court opinion.

There is no evidence in the record to support the contention that N.Y. Civil Service Law § 53 encroaches upon the exclusive federal power to admit or exclude aliens from the territory of the United States (Motion to Affirm, p. 6). The state's authority to regulate its employees is not subject to such challenge in the absence of a federal statute consistent with Congress' delegated powers. Cf. *Maryland* v. *Wirtz*, 392 U.S. 183 (1968). Further, it is uncontested that had the Appellees sought to enter the United States to perform the type of work they did for the City of New York, they would not have been admitted (Main Brief, p. 18), and there has been no showing that the operation of § 53 prevents or deters the entry and abode of aliens in the State of New York. Compare *Truax*

v. *Raich*, 239 U.S. 33, 40-42 (1915);* *Richardson* v. *Graham*, 403 U.S. *supra*, at 370, 379-80.

Appellees' claim of federal pre-emption is similarly without merit. The Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.* does not purport to dictate whom the state shall employ to conduct its affairs. To the contrary, Congressional enactment of legislation effectively limiting federal employment to citizens conclusively establishes its intent to leave this area to the discretion of the states (Main Brief, p. 12).

Graham v. *Richardson, supra*, cannot be read so expansively as to point the way, let alone mandate, the employment of aliens in the internal operations of government. The alien prior to naturalization has yet to establish "a knowledge and understanding of the fundamentals and of the principles and of the form of government, of the United States [and of the states]". 8 U.S.C. § 1423. That he is entitled to share in the public treasury in order to secure the necessities of life as are citizen taxpayers does not mean that he is entitled to share in running the government.

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* Appellees cite *Truax* v. *Raich, supra* (Motion to Affirm, p. 6), but fail to point out that were the district sustained, *Truax* would be effectively overruled. *Truax* invalidated a limitation on alien employment in the "common occupations" of the private sector, 239 U.S. *supra* at 41. The case was decided with *Heim* v. *McCall*, 239 U.S. 175 (1915) and *Crane* v. *New York*, 239 U.S. 195 (1915), which sustained alien limitations on public employment. Accordingly, *Truax* must be read as excluding public employment from the "common occupations of the community." *Truax* v. *Raich, supra* (Main Brief, pp. 19-20).

CONCLUSION

The motion to affirm the judgment of the district court should be denied and this Court should grant plenary consideration to this appeal.

Dated: New York, N. Y., June 7, 1972.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney *Pro Se*

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

JOEL LEWITTES
JUDITH A. GORDON
Assistant Attorneys General
of Counsel